

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

04-228

In the Matter of:

Auction of FM Broadcast Construction **DOCKET FILE COPY ORIGINAL** 1076
Scheduled for November 1, 2005 (Auction 62)

RECEIVED

TO THE WIRELESS TELECOMMUNICATIONS
BUREAU AND THE MEDIA BUREAU

APR 29 2005

**COMMENTS OF THE MINORITY MEDIA
AND TELECOMMUNICATIONS COUNCIL**

Federal Communications Commission
Office of the Secretary

The Minority Media and Telecommunications Council ("MMTC"), pursuant to 47 C.F.R. §1.415, respectfully submits these Comments in response to the Public Notice, DA 05-1076 (April 14, 2005) ("Auction 62 PN"). MMTC is the nation's principal advocate for ownership diversity. MMTC represents 54 national organizations before the FCC and each year holds the nation's principal minority media and telecom financing conference. In September 2004, with the bureaus' generous participation, MMTC held a training seminar for bidders in Auctions 37 and 58. MMTC filed extensive comments and related pleadings in connection with the Auction 37 Proceeding and in the Section 257 Inquiry (Docket MB 04-228). Numerous MMTC members are likely to attempt to participate as bidders in Auction 62. MMTC members, as radio listeners, expect to enjoy the programming of facilities covered by Auction 62.¹

Auctions have proven to be considerably less effective at promoting minority ownership than comparative hearings. MMTC has found that minorities operated nine out of 100 randomly analyzed Docket 80-90 permits,² but minority ownership arising from Auction 37 evidently has

¹ These Comments reflect the institutional views of MMTC and are not intended to reflect the views of any individual member of MMTC, its Board of Directors or its Board of Advisors.

² In an unpublished 1993 study, MMTC examined the final orders in 100 Docket 80-90 comparative hearings and found that 27 of the permits were awarded to minority-controlled applicants. MMTC also found that a year after the respective final orders, nine of these 27

been negligible. Indeed, the top three Auction 37 winners, each of whom used bidding credits, were wealthy non-minority career broadcast executives.³ While we wish these gentlemen well and do not suggest that they abused the system in any way, they did not need bidding credits to prevail. Congress did not intend to deprive the U.S. Treasury of revenue in order to make these gentlemen rich(er). Instead, Congress expressly sought, *inter alia*, to promote broadcast ownership by “businesses owned by members of minority groups and women[.]”⁴

The Advisory Committee on Diversity for Communications in the Digital Age (“Diversity Committee”) has recognized that minorities have been disadvantaged in securing FM facilities.⁵ With minority FM station ownership still abysmally low,⁶ the Commission should focus carefully on how to ensure that minorities have every opportunity to participate meaningfully in auctions. Congress expects the Commission to take steps to reduce entry barriers,⁷ and Congress has specifically required the Commission to consider how to advance minority participation in auctions.⁸ Further, in the *Prometheus* litigation, the Third Circuit has held that the Commission may not disregard minority ownership when it designs new regulations

winners still controlled the permit or the radio station. While obviously imperfect, this 9% minority ownership far exceeded the 3% figure for minority ownership in 1993.

³ One of these winners formerly served as the CEO of the nation’s largest radio station licensee.

⁴ 47 U.S.C. §309(j)(4)(D) (1994).

⁵ FCC Advisory Committee on Diversity for Communications in the Digital Age, FM White Paper, June 11, 2004, p. 4.

⁶ See Kofi Ofori, “Radio Local Market Consolidation and Minority Ownership (MMTC, 2002), at 12 (“Ofori”) (finding that 3.2% of FM stations in 2001 were minority owned).

⁷ Congress has established a “National Policy” under which the Commission shall promote “diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity.” 47 U.S.C. §257(b) (1996). Toward that end, Congress expects the Commission to report triennially on “any regulations prescribed to eliminate barriers within its jurisdiction[.]” 47 U.S.C. §257(c) (1996).

⁸ 47 U.S.C. §309(j)(4)(D) (1994) (Commission must “ensure that...businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures[.]”)

affecting broadcast ownership.⁹ Instead, the Commission should consider whether its regulations might have an “adverse impact on small, independent, religious, family-friendly and minority broadcasters.”¹⁰

To advance minority ownership and assist small bidders generally, we offer these nine initial proposals.¹¹

First, and as promised,¹² the Commission should complete its nine-year effort to determine whether and to what extent constitutionally permissible measures that take race into account may be used in the design of bidding credits.¹³ In 2000, the Commission produced an

⁹ In 2003, the Commission unwisely repealed the Failing Station Solicitation Rule (“FSSR”) without remembering that in 1999 it had created the FSSR as the only means of fostering minority television station ownership. The Court of Appeals had little difficulty reversing this surprising lapse on the part of the agency. Prometheus Radio Project v. FCC, 373 F.3d 372, 420-421 (3d Cir. 2004), rehearing denied, September 3, 2004 (petitions for certiorari pending). See also id. at 421 n. 59 (holding that in the broadcast multiple ownership proceeding, the Commission on remand must consider MMTC’s thirteen proposals to advance minority ownership).

¹⁰ Carriage of Digital Television Broadcast Signals, FCC 05-27 (released February 23, 2005), Separate Statement of Commissioner Kevin J. Martin, Dissenting in Part and Approving in Part, at 35. See also “FCC Chairman Michael Powell Announced Opening of Application Window for AM Radio Service: Powell Highlights Strengthening of Minority-Owned AM Stations,” FCC News Release, November 6, 2003.

¹¹ Although the Auction 62 PN did not specifically refer to minority ownership, MMTC trusts that the Commission is conscious of its statutory obligation to consider this issue, and therefore would regard MMTC’s proposals herein as falling well within the scope of the Auction 62 PN.

¹² See Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (“Wireless Report and Order”), 12 FCC Rcd 10785, 10878 ¶192 (1997) (declining to adopt race or gender conscious auction provisions, but noting that the Commission had initiated the Section 257 Inquiry and promising that “[i]f a sufficient record is adduced that will support race- and gender-based provisions that will satisfy judicial scrutiny, we will consider race- and gender-based provisions for future auctions.”)

¹³ The Commission initially proposed a set of bidding credits aimed at the groups named in 47 U.S.C. §309(j)(4)(D) (1994), but it abandoned this approach in the face of a challenge under Adarand v. Peña, 515 U.S. 200 (1995) (“Adarand”). See Omnipoint Corp. v. FCC, 78 F.3d 620 (D.C. Cir. 1996). Noting that most minority-owned businesses are small, the Commission predicted that the new entrant bidding credits would “promote opportunities by minority and women consistent with congressional intent without implicating prematurely the constitutional issues” raised in Adarand. Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses (First Report and Order), 13 FCC Rcd 15920, 19995 ¶189 (1998), recon. granted in

empirical study on auctions,¹⁴ and since November 2004 it has a full record of comments on all of its studies germane to minority broadcast ownership. Further, the Supreme Court in 2003 opened the door to modest entry criteria taking account of race,¹⁵ and it did so in a case involving student body diversity – a context closely analogous to broadcasting.¹⁶ Consequently, this summer, the Commission should complete the Section 257 Proceeding (Docket MB 04-228) so that the results of that proceeding can be applied to Auction 62.

part, denied in part on other grounds, 14 FCC Rcd 8724 (1999), modified in other respects, 14 FCC Rcd 12541 (1999), aff'd sub nom. Orion Communications Limited v. FCC, 213 F.3d 761 (D.C. Cir. 2000).

¹⁴ Ernst & Young LLP, "FCC Econometric Analysis of Potential Discrimination: Utilization Ratios for Minority- And Women-Owned Companies in FCC Wireless Spectrum Auctions" (2000) (finding that, measured across all wireless auctions through 1999, minority and women applicants were less likely to win at least one license than were non-minority applicants).

¹⁵ In Grutter v. Bollinger, 539 U.S. 306, rehearing denied, 539 U.S. 982 (2003) ("Grutter"), the Supreme Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions." Grutter has profound and promising implications for broadcast regulation, since the purpose of diversity in higher education is closely analogous to diversity in broadcasting. Justice O'Connor's opinion in Grutter cited with approval Justice Powell's invocation, in Bakke, of "our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy[.]" Grutter, 539 U.S. at 330 (citing Regents of the University of California v. Bakke, 438 U.S. 265, 313 (1978)) ("Bakke"). Justice O'Connor's opinion also cites with approval Justice Powell's conclusion in Bakke that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university "seeks to achieve a goal that is of paramount importance in the fulfillment of its mission." Id., citing Bakke, 438 U.S. at 313 (quoting Keyishan v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967)). Further, Justice O'Connor's opinion pointed to the importance of "diminishing the force of...stereotypes" as "both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students." Grutter, 539 U.S. at 333.

¹⁶ Radio is a principal tool for the "robust exchange of ideas" and "diminishing the force of...stereotypes." Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 556 (1990). As the Commission has held, new minority ownership initiatives "further the core Commission goal of maximizing the diversity of points of view available to the public over the mass media, and to provide incentives for increased economic opportunity." Minority and Female Ownership of Mass Media Facilities (NPRM), 10 FCC Rcd 27887 ¶1 (1995) (fn. omitted)). This goal is closely congruent with the goals articulated in Grutter. Review of the Section 257 Studies, "along with other studies conducted in the field" would allow the Commission "to determine whether a compelling interest exists" to support race-conscious remedies. Section 257 Staff Executive Summary (December 12, 2000), p. 4. That review is especially timely now, in light of Grutter.

Second, the Commission should conduct a study of Auction 37 to determine what specific attributes of the auction process may unnecessarily have imposed barriers to entry for minority firms. The study should encompass those who expressed interest in Auction 37 but did not participate, those who bid in Auction 37 but did not win anything, and those who won Auction 37 permits.

Third, eligibility for bidding credits should be narrowed to ensure that bidding credits are awarded only to those who truly deserve them. In particular, bidding credit eligibility should incorporate a personal net worth limitation for control persons, while still exempting institutional capital providers' passive investments from attribution. To avoid diluting the public interest value of bidding credits by bestowing them on wealthy former broadcasters, bidding credits should be given only to those who have not had an attributable interest in more than three broadcast stations within the previous five years.

Fourth, bidding credit eligibility could be expanded so that a bidder's interest in a standalone AM station would not be attributable, for bidding credit eligibility purposes, to bids for an FM permit in the same ADI (or county, if not in an ADI) as the AM station. This provision would be limited to companies owning no more than three AM stations nationally. Minority broadcasters would generally stand to gain from this provision, since (in 2001) 51.6% of minority owned radio stations were AM facilities, and a minority owned station was 43% more likely than a non-minority owned station to be an AM facility.¹⁷ Ownership of a co-situated FM station would enhance the ability of small standalone AM broadcasters to provide competitive service in a consolidating marketplace.

Fifth, potential bidders should not be permitted to specify they intend to bid on all auctioned facilities when their downpayments are insufficient to meet these obligations. Instead,

¹⁷ See Ofori, supra, at 12.

bidders should be able to specify their intention to bid on channels that have a total minimum bid of four times their deposits. The reason for this limitation is that in Auction 37, smaller bidders who sought only a handful of channels were apparently frightened away when they saw dozens of potential and speculative opponents for their channels.

Sixth, the Commission should allow a second-place bidder to be designated as a winner when the high bidder withdraws.¹⁸ In this way, the Commission would avoid the expense of re-auctioning a permit, the public would receive service more rapidly, and applicants would be rewarded for prudence.

Seventh, although the Auction 62 PN wisely underscores that bidders take their permits with no FCC guarantee of success,¹⁹ the Commission should do more to ensure that permits are likely to be viable from an engineering standpoint. In particular, no channel should be included in the auction for which CDBS shows a conflicting FM proposal or for which CDBS does not show that international coordination has been completed. By reducing the risk attendant to bidding, the Commission would particularly benefit small entrants, who unavoidably are more risk-averse than more established operators.

Eighth, the Commission should conduct more aggressive outreach to encourage minorities to bid on Auction 62 permits. It should authorize the Office of Communications Business Opportunities (OCBO), in cooperation with the Wireless Bureau and the Media Bureau, to make presentations at industry conferences, conduct seminars on its own in various major cities, and offer training materials, including mock auctions, in DVD format.

Ninth, as it did in Auction 37, the Commission should provide for same-day reporting of disentitlements to bidding credits, ensuring that bidders will have accurate information about the

¹⁸ See Auction 62 PN, p. 1 n. 1 (discussing waiver requests from Auction 37 raising this issue).

¹⁹ Auction 62 PN, pp. 9-10 (Due Diligence).

enhanced bidding strengths of their opponents.²⁰ As MMTC noted in calling for this bidding credit reform in Auction 37, contemporaneous reporting would avoid auction gamesmanship and the consequent loss of public confidence in the integrity of the auction process.²¹

In subsequent ex parte filings, MMTC may refine, elaborate upon, and add to the proposals contained in these Comments.²²

Respectfully submitted,

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²⁰ The Bureaus correctly note that during an auction, eligibility “can only remain the same or decrease.” Id. at 3 (Upfront Payments and Bidding Eligibility). The “automatic downgrade” policy was articulated in Daytona Broadcasting Company, Inc., 97 FCC2d 212, 218 (Rev. Bd. 1984 (Blumenthal, Member)), review granted in part, denied in part, 59RR2d 1302 (1985) (holding that when applicants for the same permit merge after the B-cutoff date, the surviving applicant will inherit the least comparatively advantageous attributes of each of the merging applicants). See discussion in Richard P. Bott II, 4 FCC Rcd 4924, 4927 ¶18 (Rev. Bd. 1989), review denied, FCC 90-109 (released April 12, 1990).

²¹ See, e.g., MMTC Auction 37 Comments, DA 04-1020, May 6, 2004, p. 5.

²² MMTC warmly appreciates the many wise suggestions offered by Ari Fitzgerald, Esq., Jack Mullaney, Vincent Pepper, Esq. and S. Jenell Trigg, Esq.